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C O N F I D E N T I A L SECTION 01 OF 04 TEL AVIV 002070

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USTR FOR NOVELLI AND SAUMS  
USDOC FOR 4520/CLOUSTAUNAU AND NWEIGLER

E.O. 12958: DECL: 04/05/2014

TAGS: [KIPR ETRD IS ECONOMY AND FINANCE LABOR AND COMMERCE ISRAEL RELATIONS](#)

SUBJECT: SPECIAL 301 DEMARCHE GETS QUICK GOI ATTENTION

REF: STATE 71498

Classified By: CDA Richard LeBaron for Reasons 1.4 (B) and (D)

11. (C) Summary: Aaron Abramovitch, Director General of Israel's Ministry of Justice, told Econ/C April 5 that the GOI was "surprised and confused" by the USG statement that it planned to raise Israel to Special 301 Priority Watch List status unless action is taken on data protection and copyright protection for U.S. rights holders in sound recordings (reftel). Abramovitch said a "Directors General Committee" would meet soon after the Passover holidays to decide whether to accept experts' committee recommendations on data protection. If the recommendations are accepted, the GOI will share them with the USG in mid- or late-April. The GOI has taken no official position, he said, on whether U.S. sound recordings are covered by our bilateral copyright agreement. Indeed, royalties continue to be paid. Abramovitch said the GOI wants to engage in consultations with USTR copyright experts as soon as possible in order to help resolve the issue. Abramovitch passed us a letter from Ministers Olmert (Industry and Trade) and Lapid (Justice) responding to letters from the Ambassador and Under Secretary Larson on IPR issues (text in paragraph 7). Olmert and Lapid have also arranged a meeting with Charge April 14 to discuss these issues prior to the April 16 deadline noted reftel. End Summary.

12. (C) Abramovitch said the GOI was surprised by reftel demarche, in which the USG said it intended to raise Israel to Priority Watch List unless actions were taken on data protection and copyrights for U.S. music rights holders. Israel, he said, has taken great strides on IPR enforcement. The USG stance is "confusing," he said, in that the level of IPR protection in Israel is much higher than in countries typically considered for Priority Watch List. He hoped that the U.S. would look at Israel's total performance, not just at one or two issues of concern.

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Data Protection  
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13. (C) Abramovitch noted that the GOI had been looking carefully at its data protection regime for the last year, and was now in a position to recommend changes. An experts' committee had submitted a report to the Directors General of the Ministries of Justice, Industry and Trade, Finance and Health. The Directors General Committee planned to meet soon after the Passover holidays. If the Directors General accept the recommendations, they will be forwarded to Ministers. Finally, Knesset approval for any changes in law will be required. Abramovitch said he could not share the draft recommendations with us now, but would be able to do so once they were approved at the DG level. He said the recommendations would "answer your concerns," but cautioned that we should not expect that the recommendations would be exactly what the international pharmaceutical industry has asked for, because of the need to craft rules "that will work" and that the Knesset will support.

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National Treatment for U.S. Phonogram Producers  
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14. (C) Abramovitch said he recognized that the GOI submission to USTR on the sound recording issue had not been received very favorably. The GOI had been forced into a corner, he said, by the USG insistence that the GOI make a clear statement about the protection of phonograms under the 1950 bilateral agreement. In response, the GOI sought a legal opinion from an outside source. The GOI has not endorsed that opinion (which states that music recordings may not be covered by the agreement). On the other hand, the GOI cannot ignore the opinion and state in writing (as the USG has asked) that the bilateral agreement covers phonograms. The GOI desires instead, he said, to engage in consultations with the USG about the copyright issue and the scope of the bilateral agreement. It is important to note, he continued, that royalties continue to be paid to US music producers, and the GOI has no plans to argue that royalties should not be paid.

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Letter from Olmert and Lapid; Meeting with Charge Planned  
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15. (SBU) Abramovitch said Minister of Industry and Trade Olmert and Minister of Justice Lapid had not yet had a chance to carefully review reftel demarche, although both had been apprised on its contents. Olmert and Lapid, he said, wished to meet with Charge as soon as possible after Passover (and before the April 16 deadline mentioned in the demarche) to discuss the upcoming Special 301 Review. A meeting has tentatively been set for April 14.

16. (SBU) Abramovitch passed Econ/C a letter from Ministers Olmert and Lapid to the Ambassador in response to 1) a letter the Ambassador had written to the ministers March 11 on the music recordings issue noted above and 2) a letter from Under Secretary Larson detailing USG concerns about IPR issues. The

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texts of that letter and an accompanying letter to USTR on the music recordings issue follow in paragraphs 7 and 8 below.

17. (SBU) Letter from Minister of Industry and Trade Olmert and Minister of Justice Lapid to Ambassador Kurtzer.

Begin text:

"April 4, 2004

His Excellency Mr. Daniel C. Kurtzer  
Ambassador  
Embassy of the United States of America

Dear Ambassador Kurtzer:

Thank you for your letters of March 11th and March 29th, 2004. It appears that there have been misunderstandings regarding some intellectual property issues, and we would like to take this opportunity to clarify those issues.

As you know, over the past few years the Government of Israel (GOI) has exerted enormous efforts to enhance its intellectual property regime. The GOI remains committed to fulfilling its international obligations regarding intellectual property rights, building on its past proven successes in effective enforcement and in the promotion of investment and trade.

We note first that during the past year Israel has continued vigorously to combat IP related violations in all its forms, dedicating substantial and increasing resources to strong and cooperative efforts by Israeli police and customs officers, prosecutors, judges, legislators and diplomats. Israel's significant progress during the past year is detailed in the extensive report submitted by the GOI to the U.S. Trade Representative (USTR).

Israel's intellectual property regime is a modern and effective one, more so than the systems of many countries that do not appear in any category of the "watch list". We need not belabor the point that being placed on a U.S. "watch list" may have strong ramifications, economic or otherwise, for a country that is so listed. Therefore we urge the U.S. to view Israel's system in its entirety, and not merely in the context of one or two outstanding issues.

In that context, we would like to address the two issues you raised - phonogram producers and data exclusivity - and, we hope, to allay your concerns regarding those issues.

Regarding phonograms, the GOI's newly published draft copyright bill is, needless to say, intended to be consistent with all relevant international obligations. That issue and others are elaborated in a letter sent by Adv. Howard Poliner, of the GOI's Ministry of Justice, dated March 26, 2004, to Mr. Edmund Saums of the Office of the USTR, a copy of which is attached hereto.

We believe that the protection of phonograms is an important and complex issue that requires a thorough and good faith examination. The GOI has stated that it will form an opinion on the scope of the U.S.-Israel bilateral agreement and has been examining that issue. No final opinion can be established without copyright experts from both sides engaging in detailed discussions. We again invite U.S. legal experts to assist us in opening a professional and candid dialog to arrive at a proper interpretation of our bilateral agreement among all concerned parties.

We would also like to add that in practice, to the best of our knowledge, the Israeli Federation of the Phonographic Industry has been transferring royalties for public performances to U.S. phonogram producers, and continues to do so.

With respect to the question of data exclusivity, it is the view of the GOI that its legal system and practices ensure the required level of protection that is called for pursuant to Article 39.3 of the TRIPS Agreement.

Nevertheless, as has already been reported to the USTR, the GOI formed an inter-ministerial committee whose task was to review Israel's policy regarding the protection of data exclusivity. The committee included senior representatives from the Ministries of Finance, Health, Justice, and the Ministry of Industry, Trade and Labor. The committee studied all aspects of that issue, including its implications on access to medicine, public health, budget and expenditures, industry and employment, investments and international legal commitments.

As part of its work, the committee held extensive consultations with industry representatives (both generic and innovative), Israeli health maintenance organizations, and other relevant bodies. The committee concluded its work at the end of March and has already submitted its report and recommendations to the Director Generals of the relevant ministries. The said report includes a proposal for altering the current policy in this matter. Following a meeting between the Director Generals, scheduled to take place following the Passover vacation, a final decision will be made by the relevant Ministers.

We hope that the foregoing explanation has been helpful, and we would like to suggest a joint meeting in which those issues and others will be discussed and further clarified. Additional meetings have already been scheduled between Israeli and USTR officials.

Sincerely,

Ehud Olmert  
Vice Prime Minister and  
Minister of Industry, Trade,  
Labor and Communications

Joseph (Tommy) Lapid  
Minister of Justice  
Deputy Prime Minister"

End text.

Begin text of letter from Ministry of Justice to USTR:

"March 26, 2004  
State of Israel  
Ministry of Justice  
Howard Zvi Poliner, Advocate  
Director Intellectual Property Law Dept.  
Legislation and Legal Counsel

Mr. Edmund Saums  
Office of the United States Trade Representative  
Washington, D.C.

Dear Mr. Saums,

Based on preliminary informal reactions to the Government of Israel's (hereinafter GOI) recent submission to your office in the framework of the Special 301 Review Process, we are under the impression that there are several factual misunderstandings that require clarification. In particular, it appears that USTR believes: (1) that the GOI has changed its position on the interpretation of the scope of the Bilateral Copyright Agreement; and, (2) that the recently published proposal for a copyright bill is designed to negate the Bilateral Copyright Agreement. Those assumptions are not accurate.

With regard to the scope of the Bilateral Copyright Agreement, the GOI does not now, nor has it in the past, held a formal position on this matter, nor has it stated otherwise. On the contrary, the GOI has stated that it would form an opinion on the scope of the Bilateral Agreement. In order to reach an opinion regarding the scope of the Bilateral Agreement, it was deemed necessary to seek the assistance of outside counsel. To that end the law firm of Morrison and Forester was recently asked to prepare a preliminary opinion on the question of whether US phonogram producers, as such, are covered under the terms of the Bilateral Agreement (as distinguished from copyrights in the lyrics and composition embodied in those phonograms which clearly are within the scope of several international copyright agreements). Morrison's preliminary opinion states that phonograms, as such, are not subject matter covered under the terms of the Bilateral Agreement. The Morrison opinion is only a preliminary opinion and no decision has yet been taken with regard to its conclusions. Any possible interpretations of the scope of the Bilateral Agreement are open for discussion.

With regard to the perception that the proposal for a copyright bill would effectively result in the abrogation of the Bilateral Agreement, this too is not accurate. Section 8 of the proposal is designed to empower the Minister of Justice to implement international commitments which Israel has made, or will make in the future, in the field of copyright. Indeed, nothing in the proposal calls into question the validity of existing bilateral or multilateral agreements. In other words, section 8 is intended to maintain the status quo with regard to existing bilateral agreements, whatever such status quo may be, and section 8 does not affect the interpretation of such bilateral agreements.

With regard to the optional proposal set forth in section 7(b) of the proposal for a copyright bill to not recognize "simultaneous publication" with respect to public performance and broadcast of phonograms, this too would not impact on the interpretation of the Bilateral Agreement and is effectively a separate issue. Indeed, if the Bilateral Agreement is deemed to cover phonograms as such, then the optional proposal set forth in section 7(b), even if adopted, would not supersede the terms of the Bilateral Agreement. Further, it should be noted that the proposal set forth in section 7(b), to limit the applicability of the "simultaneous publication" is consistent with the 1996 WIPO Performances and Phonograms Treaty and the Rome Convention's concept of the rule of reciprocity. Indeed, with respect to public performance rights in phonograms, reciprocity, and not national treatment, is the more common practice throughout the world and in particular in common law tradition countries such as Canada and Australia.

Accordingly, and in order to reach a better common understanding of the scope of copyright relations between our countries, we believe that it would be useful for copyright experts from both sides to engage in direct discussions either in person or by teleconference.

Sincerely,  
Howard Poliner, Adv.

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Visit Embassy Tel Aviv's Classified Website:  
<http://www.state.sgov.gov/p/nea/telaviv>

You can also access this site through the State Department's  
Classified SIPRNET website.

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LeBaron